

**ORIGINAL**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**JUL 8 1996**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

In the Matter of )

Implementation of the Local )  
Competition Provisions in the )  
Telecommunications Act of 1996 )

CC Docket No. 96-98

*DOCKETS TELETYPE ORIGINAL*

**SUPPLEMENTAL COMMENTS OF PACIFIC TELESIS GROUP**

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## SUMMARY

The Commission has asked for comments on a staff-generated computer Model. Very little is known about the Model, particularly how it is to be used. We do know, however, that the Commission cannot use the Model to make or justify decisions in the *Interconnection Proceeding* because the Model has not been adequately described, and the expected decisions, the inputs, and the outputs have not been revealed. Until all of this information is revealed the Commission would violate the Administrative Procedure Act to rely on the Model in this proceeding.

Even a cursory examination of the Model reveals significant flaws. For instance, many variables are obscure and unexplained. The Model takes inconsistent inputs. The Model fails to account adequately for cream-skimming by competitors, cross elasticities of demand for LEC services or to adequately segregate the impact of general economic trends from results caused by interconnection pricing. It also fails to take into account expected future conditions in telecommunications markets. For all of these reasons, the Commission should not rely upon the Model to make or justify decisions in this proceeding.

The Model is based on aggregate data for the entire industry. As such, it fails to take into account the financial impact on individual companies which, like Pacific Bell, vary significantly from the industry norm. Any constitutional analysis about whether a particular regulatory decision will constitute an unlawful taking depends on an evaluation of the impact such decisions have on individual companies, not on the industry as a whole or on an "average" LEC.

Finally, even if its defects were cured, the Model may not be used to justify a decision to permit interexchange carriers to purchase unbundled network elements pursuant to section 251 for the provision of interexchange services and thus bypass the federal access charge system. The language of the Act clearly provides that interconnection under section 251 is not meant to avoid access charges, and section 2(b) continues to maintain state jurisdiction over intrastate rates. Last, but not least, section 410(c) would require that such a fundamental shift of interstate costs to the jurisdiction of state commissions under section 251 would require referral of the issue to a federal-state joint board.

We commend the staff for attempting to evaluate the impact of its decisions. Although modeling can be an important analytic tool, we are greatly concerned that the Staff's Model is not sophisticated enough to account for individual LEC differences.

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**SUPPLEMENTAL COMMENTS OF PACIFIC TELESIS GROUP**

Pacific Telesis Group ("PTG"), by its attorneys, herewith submits its supplemental comments in the above-captioned proceeding. This proceeding is considering rules to govern interconnection pursuant to section 251 of the Communications Act, a provision that was added by the Telecommunications Act of 1996.<sup>1</sup> These supplemental comments are filed pursuant to the Public Notice requesting comments on a staff computer Model that "allows the user to simulate the relative impact of particular changes in the industry."<sup>2</sup>

We commend the Commission for attempting to quantify the effects its decisions will have on the local exchange carrier ("LEC") industry. A well-designed and well-documented Model would help the Commission avoid adopting interconnection rules that would deprive the LECs of the opportunity to earn a fair return. Thus, we do not oppose any modeling

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

<sup>2</sup> Supplemental Comment Period Designated For Local Competition Proceeding, CC Docket 96-98, DA 96-1007 (released June 20, 1996)("June 20 Public Notice"). The comment deadline was subsequently extended to July 8, 1996. DA 96-1030 (released June 25, 1996).

effort in principle. Nevertheless, due to the lack of detail about the Commission's Model and the tardiness of its release, it would be inconsistent with the Administrative Procedure Act ("APA")<sup>3</sup> to rely on the Model either to reach decisions or to support decisions already made.

The Model may be used only if the Commission first identifies the decisions it expects to support with the Model, and reveals all data entered into the Model and the outcomes derived. The usefulness of the Model would then still be limited by its inability to determine whether any one LEC would be financially harmed by any decision. In no case would the Model's results make an otherwise unlawful decision legal. Finally, we believe that the Model cannot be used to justify a decision to permit the avoidance of interstate access charges. The statute does not permit such a result.

## **I. BACKGROUND**

The June 20 Public Notice indicates that the FCC staff has developed a computer Model that will allow users to "calculate a variety of outputs from nearly 200 specifications."<sup>4</sup> The first time the Model, a computerized spreadsheet program, was released to the public was on June 17, 1996, only 52 days before the deadline for a decision in the interconnection docket.<sup>5</sup> The Commission announced that it was placing a copy of the Model in the docket of the above-captioned proceeding

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<sup>3</sup> 5 U.S.C. § 551, *et seq.*

<sup>4</sup> June 20 Public Notice at 1.

<sup>5</sup> *See* 47 U.S.C. § 251(d)(1).

The Commission has provided no written documentation of the Model. There is only a brief, general description in two public notices and what can be pieced together from the Model itself. The Commission staff did request informal meetings with certain specified companies, but it never reduced the content of these meetings to writing. We were asked to attend one meeting, but we were not permitted to attend all of the meetings or to learn what information was imparted there. Therefore, we do not know whether additional information was provided to the parties attending the other meetings <sup>6</sup>

Consequently, very little has been revealed about how the Model will be used, what data was entered into the Model, and what formulas were used within the Model. By placing the Model in the record of this proceeding, however, the Commission strongly implies that it intends to rely on it to justify decisions made in this docket.

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<sup>6</sup> In a Motion for Extension of Time filed on June 21, 1996, Cox Communications, Inc. suggested that the LECs "have had access to the developers of the proposed Model prior to its public release and have had the opportunity to ask questions to evaluate the variables in the Model and thereby reach a full understanding of -- and perhaps even influence -- its underlying assumptions." Cox Motion at 2. No such "influence" was exerted. The meetings were requested by the Commission staff, who informed Pacific's representative that a similar meeting or meetings would take place with IXC's and CLEC's. To suggest that we reached "a full understanding of [the model's] underlying assumptions" is a huge overstatement. The model was presented as a completed work, and not all of its assumptions were explained. We were not asked to comment or opine on it; we imparted no information that is not already in the record. Cox further insinuates that *ex parte* notices should have been filed. *Id.* at n.4. However, no *ex parte* notices were required. See 47 C.F.R. §§ 1.1202(a) (definition of "presentation"), 1.1204(b)(7) (exemption for presentation requested by Commission or staff). The Commission's Public Notice gives Cox exactly the same opportunity -- however deficient it may be -- to comment on the Model that we have. See *Western U. Intern., Inc. v. FCC*, 568 F. 2d 1012, 1019 (2d Cir., 1977); *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995).

**II. THE COMMISSION HAS NOT PROVIDED ENOUGH INFORMATION ON ITS MODEL TO ALLOW INTERESTED PARTIES AN OPPORTUNITY TO PROVIDE MEANINGFUL COMMENT AS REQUIRED BY THE APA.**

If the Commission relies on the Model to make or support decisions in this proceeding without providing additional information, it will have failed to provide interested parties with the required notice and an opportunity to comment in violation of the APA.

Before the Commission may rely on the Model, the Commission must disclose the data and assumptions underlying the Model, the tentative conclusions it may reach, and the results of the data run based on those tentative conclusions. The Commission must then permit interested parties to comment on that information

In considering the use of computer models by agencies in rulemaking proceedings, courts have concluded that public comment on the agency's assumptions, data, and conclusions is critical. In *Sierra Club v. Costle*, 657 F.2d 298 (1981), the court stated that "any agency must sufficiently explain the assumptions and methodology used in preparing the model; it must provide a 'complete analytic defense of its model [and] respond to each objection with a reasoned presentation.'" *Id.* at 333 (quoting *Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1039 (D.C. Cir. 1977))(footnotes omitted). In determining that the EPA's use of a computer model was proper, the court concluded that "[t]he safety valves in the use of such sophisticated methodology are the requirement of *public exposure of the assumptions and data incorporated into the analysis* and the acceptance and consideration of public comment, the admission of uncertainties where they exist, and the insistence that ultimate responsibility for the policy decision remains with the agency rather than the computer." *Id.* at 334 (footnotes omitted)(emphasis added). *See also Sierra Club v. United States Forest Service*,



878 F. Supp. 1295 (D. S.D. 1993); *National Resources Defense Council, Inc. v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985).

When considering the adequacy of the notice of data and studies on which a proposal is based, courts have generally found that "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency." *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973). In the *Portland Cement* case, the EPA proposed a stationary source standard for cement plants, but the agency did not disclose the details regarding the tests or methodology used until after the comment period had closed and it had adopted a standard based on these tests. The industry submitted evidence to the court that the testing methodology was seriously flawed and had produced erroneous results. After the court remanded the case to the EPA so that it could consider the new evidence, the agency simply included the evidence in the record and reaffirmed its earlier decision. In its second remand, the court held:

We find a critical defect in the decisionmaking process in arriving at the standard under review is the initial inability of petitioners to obtain -- in a timely fashion -- the test results and procedures used on existing plants which formed a partial basis for the emission control level adopted.

*Id.* at 392. Other regulatory agencies observe these same principles. For example, the California Public Utilities Commission requires that any "party who submits testimony or exhibits . . . which are based in whole, or in part, on a computer model" provide the following data, *inter alia*, to all parties:

- (1) A description of the source of all input data;
- (2) The complete set of input data (input file) as used in the sponsoring party's computer run(s);

- (3) Documentation sufficient for an experienced professional to understand the basic logical processes linking the input data to the output, including but not limited to a manual which includes:
  - (i) A complete list of variables (input record types), input record formats, and a description of how input files are created and data entered as used in the sponsoring party's computer model(s).
  - (ii) A complete description of how the model operates and its logic.<sup>7</sup>

The Commission provides none of this information for its Model. Interested parties have not been given access to the basis for the Model or the data used to develop it. For example, the absence of operating instructions and adequate documentation make evaluating the Commission's Model a process of trial and error. We only know the Commission may use the Model either to make decisions or provide support for decisions in the interconnection docket. The Commission has not explained the tentative conclusions it has drawn from the Model. Without knowing how the Commission plans to use the information derived from the Model, we cannot evaluate it in significant respects. For some calculations, the Model may be ideal, but for others, it may be grossly inaccurate. PTG and others will therefore be unable to provide the Commission with meaningful comments.

Thus, before the Commission could rely on its proposed Model for any purpose in the interconnection proceeding, it would have to disclose the tentative decisions it intends to make, release the data that were entered into the Model, the assumptions the data was based upon, and the results of this data run, and seek further comments from interested parties. By not fully explaining the basis for its Model, the Commission has removed the safety valve the court found critical to ensuring that computer models are used properly.

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<sup>7</sup> See Cal. Code Regs., tit. 20, § 74.3.

### **III. EVEN A CURSORY EXAMINATION OF THE MODEL REVEALS SERIOUS CONCERNS**

With these Supplemental Comments, we are filing an analysis of the Commission's Model conducted by Dr. Richard Emmerson. *See* Appendix A. As Dr. Emmerson explains, a cursory examination of the Model reveals a number of reasons that its usefulness is severely limited. We appreciate the difficult task the Commission faces in creating this type of model. With time, these flaws could be understood and fixed. However, there simply is not time enough left before the Commission must issue an order in this proceeding to fix these problems.

*Obscure variables.* As a result of inadequate documentation, the meaning and relevance of some of the Model's variables are unclear. For example, the Model seems to presume that LECs can measure usage over unbundled loops. LECs cannot measure usage over loops unless they also switch the traffic because measurement capability resides in the switch. In addition, the concept of a "total bill" customer is unexplained.<sup>8</sup> The implications of this variable are unclear. Does the Commission believe that customers in the future will purchase all telecommunications services from the same carrier? In addition, the Model includes a variable that seemingly permits CLECs to "flow through" the differences between "traditional" and "nontraditional" access charges (a cryptic term in its own right).<sup>9</sup> Whether this variable reflects an assumption about how CLECs will set prices, or an assumption that competition will undermine the existing rate structure is not clear. Finally, the Model also

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<sup>8</sup> Model, variables 47 & 49, lines 114 & 116

<sup>9</sup> Model, line 55, *et seq.*

includes a variable purporting to represent price reductions in the "non-access" portion of toll charges.<sup>10</sup> But toll services are not priced that way. These examples demonstrate the difficulties in attempting to evaluate the Model.

*Inconsistent Inputs.* The way the Model accepts inputs is inconsistent. For example, for local service rates, the Model will accept inputs for 1993 through 1996; but for toll rates, it only accepts inputs for 1993 and 1994. This makes the results of the Model of dubious relevance to Pacific Bell, because our rates changed substantially in 1995, the year when competition for intraLATA toll began in California.

*Cream-skimming.* It is clear that the Model lacks the sophistication needed to predict the financial effect on LECs of competitor's first selling to our most profitable customers, or cream-skimming. New entrants will focus their efforts on customers who are less costly to serve or who purchase large volumes of services (especially services where prices are much higher than costs). The unit costs of providing telecommunications services diminish as traffic density increases, and the largest traffic density occurs in small geographic areas. The only concession the Model makes to the fact that some customers are more profitable to serve than others is a "skewing factor."<sup>11</sup> A different value for this factor can be assigned to residential and business customer classes stratified according to the amount of toll usage. The Model does not take into consideration geographic differences in the costs of serving customers due to differences in customer density, geographic concentration of high volume users, and varying service profitability. In addition, the Model uses "average" toll rates,

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<sup>10</sup> Model, line 110.

<sup>11</sup> Model, variable 66, lines 142-48.

ignoring the likelihood that competition will bring *restructured* toll rates, for example through volume discounts or postalized pricing.

*Cross-elasticities.* The Model also does not sufficiently account for cross-elasticities among LEC services. Large users are sophisticated, highly informed about substitutes, and capable of supplying a large portion of their own telecommunications services. Customers are quick to take advantage of price differences between similar services. The distinction the 1996 Act makes between local exchange service and access will no doubt result in illicit arbitrage until all rates can be reset to reflect proper economic principles. At a minimum, the Model should include a factor tied to differences in rates for (1) switched access and termination local traffic; (2) residential and business unbundled loop rates; and (3) wholesale rates for resold services and the rates for the unbundled network elements.

*Other economic factors.* The Model is also not discrete enough to distinguish between the effects of greater competition for local exchange services and the effects of relevant general economic factors, such as business cycles, economic growth, and other industry trends. In fact, these other factors are subsumed in the Model's input specifications. This means that important variables are either passed over or obscured. The likely result will be that the future financial performance of different industry segments will mistakenly be attributed to particular terms and conditions for interconnection, unbundling and resale when part of the causes may instead be found in general economic influences.

*Financial projections.* The Model attempts to project changes in financial accounting categories, such as revenues, earnings and net investment. To make projections of this kind, however, the Model needs to make specific assumptions about improvements in productivity,

changes in demand, capital expenditures, and macroeconomic factors. As the Commission discovered in the *LEC Price Cap Performance Review*, CC Docket No. 94-1,<sup>12</sup> the measurement of *productivity* improvements is a science unto itself -- and that exercise only measured past improvements in productivity and did not predict future ones. Several factors that can be expected to occur in the future will significantly affect future productivity gains. For instance, as competition siphons off the LECs' revenues without a corresponding reduction in costs, LEC productivity can be expected to decline. In addition, the level of demand depends upon such factors as customer income, population growth, and the rate of adoption and diffusion of new technologies. Capital expenditures depend upon growth in demand, maintenance, replacement, and modernization of facilities. Important macroeconomic variables include growth in individual income and corporate profits, and interest rates. The Model's only concessions to incorporating macroeconomic variables include specifying an inflation rate, growth in real Gross Domestic Product (GDP), and Moody's Aaa bond yield (which is not Pacific Telesis' rating).

If the Model's purpose is to forecast the financial effect of different terms and conditions for interconnection, collocation, unbundling and resale, it has several other defects. Nothing in the Model appears to account for the added costs that will accompany interconnection, collocation and unbundling. For example, if all other things are equal, the LECs' unit costs will increase because of lower utilization rates. Increased costs could also result from physically unbundling network components and functions that would be more

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<sup>12</sup> Price Cap Performance Review for Local Exchange Carriers, Second Report & Order and Third Notice of Proposed Rulemaking, 10 FCC Recd. 11098 (1995), *petitions for recon. pending*.

efficiently provided in a package. In addition, the Model does not account for the higher costs LECs will incur to pay CLECs for terminating local traffic, or the resulting revenues accruing to the CLECs. These apparent defects make the results of entering any data into the Model highly suspect, limiting the usefulness of the Model.

**IV. IF THE COMMISSION RELIES ON THE MODEL TO DEMONSTRATE THAT ITS DECISIONS WILL NOT CAUSE A HYPOTHETICAL LEC TO EXPERIENCE CONFISCATORY RETURNS, INDIVIDUAL REAL-WORLD LECS MAY STILL HAVE VALID TAKINGS CLAIMS.**

The Model appears to be intended to provide results for three segments of the industry: LECs, competitive local exchange carriers ("CLECs"), and interexchange carriers ("IXCs"). Unfortunately, it is not capable of predicting financial effects on individual firms, which is what the Commission needs to know for its rules to pass muster under *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989) ("*Duquesne*").<sup>13</sup> Results that appear reasonable for an "average" LEC or the LEC industry as a whole can mask a wide array of unreasonable results for individual LECs. Therefore, the Model does nothing to ensure the constitutionality of Commission decisions on interconnection rates. Interconnection rules will not pass legal muster under any standard of review merely because a Model shows that on average the results are reasonable. We recognize that it is better for the Commission to be curious about the effect of its rules on the industry than not. But that curiosity cannot

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<sup>13</sup> Of course, if an industry-wide model suggests that a particular set of rules would have a deleterious effect on all LECs, it certainly would raise an obvious red flag under *Duquesne*.

become a substitute to adopting regulations that produce a reasonable end result for each individual company.<sup>14</sup>

In addition, the Commission may not engage in result-oriented decision making. The fact that the Model is designed to produce separate values for the revenues and operating profits of three industry segments suggests that the Model is designed to answer what will promote the financial health of IXC's and CLEC's as well as "acceptable" financial performance for the LEC's. The LEC's' ability to earn a fair return is essential in evaluating whether regulations forcing use of their property is constitutional. But no such constitutional dimension arises with respect to IXC's and CLEC's. Indeed, the level of profitability of IXC's and CLEC's is simply not relevant to any decision the Commission must make. Rather, the Commission must be guided by what produces fair compensation to LEC's and promoting *efficient* entry in the local exchange market. Good financial results for IXC's and CLEC's will naturally result for efficient entrants.

The Model assumes that averaged inputs will be valid without variation to all LEC's.

In the real world, however, input data will vary widely among LEC's. For example:

- Access charges vary by roughly 400 percent from carrier to carrier (with Pacific Bell being at the very low end).
- There is a tremendous range of intraLATA toll traffic from region to region (Pacific Bell accounts for 35 percent of the intraLATA toll in the nation, and any averaged number will therefore seriously understate our reliance on toll revenues to provide affordable local service).
- Basic service rates vary by a factor of more than two-to-one across the country (with Pacific Bell again at the low end).

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<sup>14</sup> See *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).



- The rate of competitive entry will be markedly different across the country. Whether measured by collocation requests or application for local exchange authority, Pacific Bell already faces more competition than any other LEC. Conditions in California (including low access charges and relatively high intraLATA toll rates) virtually assure the competition will expand more rapidly in Pacific Bell's region than anywhere else in the country.
- The cost of providing service varies hugely from region to region, depending on such factors as terrain, loop length, density, and labor rates.

Accordingly, even if the Model uses inputs and assumptions that the Commission believes will typify the "average" LEC, the results will only coincidentally be reasonable for any specific LEC. More likely, some LECs will fare better than predicted, and many others will fare much worse. As a consequence, any conclusion that a particular set of rules will not unduly restrict LEC property rights will be wholly unreliable, and a great number of real-world LECs may well suffer a taking of their property without just compensation. Put another way, the Constitution requires not only that a decision appear to result in reasonable compensation, but also that it actually provide a company with the opportunity to earn a reasonable return on its investment.

The record in this docket is replete with LEC legal analyses demonstrating that inadequate cost recovery resulting from regulatory actions is an actionable taking.<sup>15</sup> We will not replicate those arguments here, but will simply note that the Commission's constitutional/responsibilities are clear:

the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. . . . If the rate does not afford sufficient compensation, the State has taken the use of utility property without just compensation and so violated the Fifth and Fourteenth Amendments.

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<sup>15</sup> See, e.g., USTA at 36-50; GTE at 66-72.

*Duquesne*, 488 U.S. at 307-08. The return to the enterprise must be "sufficient to assure confidence in the financial integrity of the enterprise," 320 U.S. at 603, and must not interfere with "reasonable investment backed expectations." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). The Commission's Model cannot guarantee that these obligations will be satisfied with respect to all LECs; therefore, a conclusion based on the Model that the rules adopted in this proceeding will not unduly harm such carriers cannot insulate the Commission from takings claims when individual LECs are in fact denied reasonable compensation.

Only the most sophisticated industry-wide model could accurately predict financial outcomes to a LEC as far from the norm as Pacific Bell is. We are concerned that the Commission's Model does not meet that mark. For example, even if relevant data is entered

into the Model -- for example, with our rates rather than nationwide averages<sup>16</sup> -- it produces results that are at best counter-intuitive. For example, the Model "proves" that the more of the intraLATA market our competitors capture, and the less of the interLATA market that we capture, the better off we will be. A model that produces results that are this far off for one company cannot be a reliable source of information even about the industry as a whole because it gives such a distorted picture.

**V. THE MODEL MAY NOT BE USED TO JUSTIFY A DECISION TO ALLOW IXC'S TO OBTAIN INTERCONNECTION FOR INTEREXCHANGE SERVICES PURSUANT TO SECTION 251.**

One data variable that has not been entered in the Model but has major significance to LEC profitability is the level of federal access charges. IXCs have argued that they should be able to negotiate interconnection agreements for the provision of interexchange services

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<sup>16</sup> Examples of rate differences between Pacific Bell and the FCC's Model include the following:

Line	Item	Year	Pacific	FCC Model
4	Price of interstate toll access	1996	0.019	0.0273
6	Price of intrastate access	1996	0.0134	0.0436
19	Residential local service (Pacific rate is average of flat and measured)	1995	10.48	13.66
20	Business customer average service rate	1995		27.56
	Pacific Bell Measured Rate w/Average local & zone usage measurement calling		10.32 23.87	
21	Average price per toll minute			
	Residence	1994	0.1455	0.1243
	Business	1994	0.1887	0.1243
	But after Interim Rate Decision			
	Residence	1995	0.0760	No Input
	Business	1995	0.0749	No Input

pursuant to section 251 of the Act instead of paying access charges. What is more, the Commission has raised in the NPRM the issue of the interrelationship of federal access charges and interconnection under section 251. NPRM at ¶¶ 159-165. Although we firmly believe that prompt reform of federal access charges is essential, that reform should not be conducted through a back door in this proceeding. Because access reform must necessarily be accomplished outside the section 251 context, we would be very concerned if the level of access charges is in fact at issue in this proceeding.

**A. Sections 251 and 252 are not available to IXC's for obtaining network elements for the purpose of providing interexchange services.**

As we stated in our comments and reply comments, sections 251 and 252 do not confer rights on IXC's to obtain unbundled network elements for the provision of interexchange services. First, the plain language of the statute concludes that IXC's are not eligible for section 251 interconnection for the provision of interexchange services because they would not be *offering* exchange access, but only receiving it from the LEC's. Second, section 251(g) and the Act's legislative history preserve the Commission's access charge regime, which would be undercut if IXC's could evade that system by gaining access to interconnection pursuant to section 251. Third, applying sections 251 and 252 to LEC-provided interexchange access would grant states jurisdiction to arbitrate and approve interstate rates, which are the exclusive province of the FCC. Finally, allowing IXC's cost-

based access to unbundled network elements would allow them indirectly and unlawfully to avoid access charges.<sup>17</sup>

**B. Because the existing jurisdictional boundaries between intrastate and interstate services remain in place after passage of the Act, Congress clearly intended that federal access charges remain regulated at the federal level pursuant to Title II.**

Since 1934, section 2(b) has governed the fundamental separation of jurisdiction to regulate telecommunications services between the state and federal governments. The retention of section 2(b) after passage of the Act resoundingly confirms that Congress did not intend to alter this fundamental jurisdictional split, except where it specifically said so in the 1996 Act. Deciding that section 251 governs interconnection for interexchange services would fundamentally alter this jurisdictional split

Section 2(b), Title II, and section 410(c) of the Communications Act have for decades laid the ground rules for this separate jurisdiction. The Court confirmed this understanding in the seminal case of *Smith v. Illinois*, 282 U.S. 133 (1930), which interpreted provisions in the Interstate Commerce Act similar to those contained in the Communications Act. *Smith* has guided the FCC and courts for decades in evaluating the jurisdictional split in telecommunications regulation. Charges for interstate services, including interstate exchange access services, are established exclusively at the federal level. These charges are based on costs after they are separated between federal and state jurisdictions pursuant to Part 36 of

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<sup>17</sup> PTG Comments at 78-80; PTG Reply at 36

the Commission's rules.<sup>18</sup> Rates for intrastate services are established at the state level using costs previously assigned to the state jurisdiction.

As described above, nowhere in the Act is there any inkling that Congress intended to alter this fundamental separation between the jurisdictions. It is significant that the IXCs can cite to no statutory language or legislative history that even hints directly that the regulation of interstate access charges should now be governed pursuant to section 251 and, consequently, subject to state regulation for the very first time in decades. If Congress had intended such a result, it would have specifically amended section 2(b), as it did when it specifically carved out an exception to the traditional federal-state boundary in the language of section 2(b) for commercial mobile radio services. *See, e.g.*, 47 U.S.C. § 332(c).<sup>19</sup> It never made such an amendment in this instance. It is well-settled that the courts are loathe to interpret statutes to work repeals of statutory provisions by implication. *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976).

Moreover, the only significant federal-state jurisdictional shift in the pricing arena in the 1996 Act provides the FCC with expanded jurisdiction to conduct limited oversight of the

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<sup>18</sup> Of course, price cap carriers generally no longer establish rates based on costs. However, the going-in rate for price caps was based on the prices in existence immediately before the price cap rules became effective, which themselves were based on separated interstate costs. Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Recd. 6786, 6814 (1990), *modified on recon. on other grounds*, 6 FCC Recd. 2637 (1991), *aff'd*, *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

<sup>19</sup> The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993), specifically amended section 2(b) to exempt commercial mobile service providers from state jurisdiction. In addition, that Act also added the following provision: "Notwithstanding section 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service . . ." 47 U.S.C. § 332(c)(3).

interconnection process for the provision of competing exchange services. States continue to play the most significant role in the area of regulating rates for exchange service and interconnection with competing LECs.<sup>20</sup> Therefore, contrary to the IXC's contentions, these provisions do not grant the FCC plenary jurisdiction over the section 251 interconnection process. Rather, under the IXC's scenario, the more logical reading would be that the provision would give states jurisdiction to regulate interstate exchange access rates. This would be an astonishing conclusion to reach with no Congressional explanation. If Congress had intended that such a fundamental shift in jurisdictional separation take place, it most certainly would have dictated that result explicitly in the 1996 Act and clearly indicated it was doing so in the legislative history of the 1996 Act. Yet no such discussion occurs anywhere except in IXC pleadings.

The fact that the jurisdictional separations process, a creature of section 2(b), remains in place is strong evidence that the FCC continues to be the exclusive regulator of interstate exchange access rates. Billions of dollars in costs would be shifted from federal to state jurisdiction under the IXC's interpretation of the 1996 Act.<sup>21</sup> Congress nowhere acknowledged that it was effecting such a fundamental shift. At a minimum, this radical

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<sup>20</sup> In fact, the only clear division of responsibility in the 1996 Act with respect to interconnection is to give the FCC jurisdiction to determine which network elements should be unbundled pursuant to section 251(d)(2) and to the states to arbitrate interconnection pricing disputes pursuant to section 252.

<sup>21</sup> Furthermore, if the IXC's position were adopted it would require interstate and intrastate access to be priced at long non-incremental costs. This would be inconsistent with the Act's procompetition goals by requiring massive increases in local rates to make up the resulting deficit in access revenue requirements.

restructuring of costs would require that the Commission refer the issue to a federal-state joint board pursuant to section 410(c) of the Act.

Section 410(c) provides in relevant part: "The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses pursuant to a notice of proposed rulemaking . . . to a Federal-State Joint Board." If the FCC agrees with the IXCs on this issue, section 410(c) compels referral to a joint board prior to a Commission decision.

This type of fundamental jurisdictional shift in costs is precisely the type of issue that Congress had in mind when it enacted section 410(c)'s mandatory referral. The FCC has no power over intrastate rates. Therefore, the FCC could not fundamentally alter intrastate rates by unilaterally shifting costs between federal and state jurisdictions without conducting a joint conference where state input could be formally obtained. This type of fundamental shift is different from *MTS and WATS Market Structure*<sup>22</sup> where the Commission found that it need not refer an issue to a federal-state joint board where the method of recovering interstate costs was changed to establish the subscriber line charge because that decision had only an incidental impact on state costs. Here, not only the method of collecting costs is being changed, but rather significant interstate costs would be shifted to the state jurisdiction. In these circumstances, at a minimum, section 410(c) would require a referral to a joint board.

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<sup>22</sup> 93 F.C.C.2d 241 (1983), *recon.*, 97 F.C.C.2d 682 (1984), *further recon.*, 49 Fed. Reg. 7810 (1984), *aff'd*, NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984).



We do agree that for policy reasons federal access reform and universal service reform should be decided soon. In the meantime, Congress clearly understood the jurisdictional distinction between interconnection pricing and interexchange access charges: it required interconnection for local exchange competition to proceed now under section 251, leaving access reform to the Commission pursuant to a separately driven timeframe pursuant to section 251(g).

Given the law as stated above, a serious flaw exists in the Model if it is the Commission's intention to include access for the provision of interexchange services in section 251 interconnection data. This methodology would seriously undermine the usefulness of the Model. Therefore, the Model should not be used in its current form for any purpose in the interconnection proceeding.